(12)

No. 05-380

IN THE
SUPREME COURT OF THE UNITED STATES

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

— v. —

LEROY CARHART, M.D., WILLIAM G. FITZHUGH, M.D., WILLIAM H. KNORR, M.D., and JILL L. VIBHAKAR, M.D., on behalf of themselves and the patients they serve,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE TO SUPPLEMENTAL BRIEF OF PETITIONER

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Pursuant to Rule 15.8 of this Court, the Respondents, Drs. Carhart, Vibhakar, Fitzhugh, and Knorr, file this response to the Supplemental Brief for the Petitioner ("Pet. Supp. Br."), filed February 15, 2006. Contrary to the claim of Petitioner, the decisions of the Courts of Appeals in *Planned Parenthood Federation of America, Inc. v. Gonzales*, No. 04-16621, 2006 WL 229900 (9th Cir. Jan. 31, 2006), and *National Abortion Federation v. Gonzales*, No. 04-5201-CV, 2006 WL 225828 (2d Cir. Jan. 31, 2006), support denial of review in this case, as does this Court's decision in *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006).

1. In the first instance, Petitioner's suggestion that this Court's decision in *Ayotte* regarding the underlying need for a health exception was based solely on New Hampshire's concession that the New Hampshire law at issue there would be unconstitutional without one is erroneous. In fact, this Court stated: "New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'" 126 S. Ct. at 967 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992). *Ayotte* thus undermines Respondent's request for review on the basis that the Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531) ("the Act"), does not contain a health exception. In addition, unlike the situation in *Ayotte*, where the Court found it was an "open question" as to legislative intent with regards to remedy, particularly in light of the New Hampshire law's severability clause, 126 S. Ct. at 969, Congress's intent in enacting the Act is exceedingly clear from the text of the Congressional findings. Congress left no doubt that it would prefer no Act at all to one that conforms to this Court's mandate that "where substantial medical authority supports the proposition that banning a particular abortion procedure

could endanger women's health," restrictions such as the Act must contain a health exception. *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000).

2. Petitioner argues that the Court should grant review in this case even though there is no conflict among decisions of courts of appeals and the courts of appeals have decided the issues *in accordance with* recent binding precedent of this Court. *See* S. Ct. Rule 10(c). In essence, Petitioner is asserting that this Court must grant review in *all* cases where an Act of Congress is struck down. (Pet. Supp. Br. at 7.) While this was true prior to 1988, that statutory mandate was repealed, thereby giving this Court discretion to decline review when it is unwarranted. *See* Pub. L. No. 100-352, 102 Stat. 662 (1988) (repealing 28 U.S.C. § 1252).

If there is any case where it is appropriate to deny review of a decision striking an Act of Congress, it is this one. There is no conflict among the courts of appeals on the issue of whether substantial medical authority supports the need for a health exception in the Act. Indeed, the courts of appeals faithfully and uniformly applied the proper analysis, adopted by this Court in *Stenberg* just three years before the Act was adopted.

Other than a stronger factual record supporting the need for a health exception, the only difference between this case and *Stenberg* is the Congressional findings. Those findings, purporting to justify the Act and challenge the *Stenberg* ruling are, however, unsupported under any level of deference. Given that three district courts and two courts of appeals, reviewing the Congressional record under the most deferential standard, concluded that the findings were not reasonable, there are no grounds for this Court to grant review.[1]

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[1] Although the Eighth Circuit did not consider the issue of deference relevant to its analysis, *Carhart v. Gonzales*, 413 F. 3d 791, 799 (8th Cir.

Indeed, denial of review is even more appropriate here where Congress's motive is clear. Congress did not write on a clean slate but instead adopted the Act in a blatant attempt to challenge this Court's *Stenberg* ruling, as well as its role in interpreting the Constitution. Congress's demand that the courts defer blindly to its Findings, a demand echoed by Petitioner (*see* Opp. Cert. at 16-27), would improperly shift to Congress the role reserved for the courts in interpreting the Constitution, and grant Congress unlimited new powers. *See City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) ("[T]he Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches.").

Moreover, granting review in this case would in essence be accepting the Petitioner's invitation to ignore *stare decisis* and reconsider *Stenberg*. (*See* Opp. Cert. at 24-25.) Such a decision would undermine confidence in the Court. As this Court has noted,

> [t]o overrule prior law for no other reason than [a present doctrinal disposition to come out differently] would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.

Casey, 505 U.S. at 864. Worse still, to overrule precedent "'upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to

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2005), it noted that Petitioner "at no point engages the analysis undertaken by all three district courts to have addressed the constitutionality of the Act . . . that Congress's conclusion that a consensus has formed against the medical necessity of the procedure was unreasonable." *Id.* at 801 n.4.

serve.'" *Id.* (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)). Even more damage would be done in a case, like this one, where the evidence supporting the Court's original decision is only different in that it is even stronger now than it was six years ago. (Opp. Cert. at 2-11.)

3. The Petitioner halfheartedly implies that the decisions by the Courts of Appeals conflict, pointing to what it characterizes as the "extended analysis" and, most remarkably, to what it claims are "differing views" offered by the Second and Ninth Circuits "concerning the constitutionality of the Act." (Pet. Supp. Br. at 10.) But the use of slightly different language to come to the same conclusion does not create a conflict.

Even the Petitioner must admit that the Second, Eighth, and Ninth Circuits had the same view of the constitutionality of the Act. All three courts held the Act unconstitutional because it fails to contain a health exception in violation of *Stenberg* and thirty years of this Court's precedents requiring that women be protected from government restrictions on their right to terminate their pregnancies, where those regulations will subject them to harm. (*See* Pet. Supp. Br. at 2, 4.)[2]

Then, citing extensively to the *dissent* in the Second Circuit, the Petitioner tries to imply a conflict between the Courts of Appeals decisions on the issue of deference to the Congressional findings. But again, all three courts rejected the Petitioner's claim that the Findings trumped *Stenberg* and the medical evidence. *Planned Parenthood Fed'n of Am.*, 2006 WL 229900, at *8-9; *Nat'l Abortion Fed'n*, 2006 WL 225828, at *5-6; *Carhart*, 413 F.3d at 799. All three applied

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[2] Nor, of course, does "extended analysis" (*see* Pet. Supp. Br. at 10), a conflict make.

the *Stenberg* analysis to strike the statute for lack of a health exception.

4. Though unstated by Petitioner, this Court's decision in *Ayotte* has obviously already answered Petitioner's claim that the Eighth Circuit erred by failing to apply the "no set of circumstances" standard to Respondents' facial challenge. (*See* Pet. for Cert. at 18-21 (citing *United States v. Salerno*, 481 U.S. 739 (1987)).) Moreover, the considerations outlined in *Ayotte* as to the appropriate remedy in cases like this one compel the conclusion that facial invalidation of the Act is the only available course. Thus, there is no reason to disturb the judgment of the Eighth Circuit striking the Act in its entirety.

In *Ayotte,* this Court emphasized "[t]hree interrelated principles" that must guide the courts when considering the remedy for a statute that unconstitutionally impedes access to abortion. *Ayotte*, 126 S. Ct. at 967. First, the court should try to invalidate no more of a statute "than is necessary." *Id.* Second, "mindful that [the courts'] constitutional mandate and institutional competence are limited," courts must "restrain [themselves] from 'rewrit[ing] a state law to conform it to constitutional requirements' even as [they] strive to salvage it." *Id.* at 968 (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)) (third alteration in the original). Finally, "a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Id.* (quoting *Califano v. Westcott,* 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)). Thus, after finding an application or portion of a statute unconstitutional, the courts must ask: "Would the legislature have preferred what is left of its statute to no statute at all?" *Id.* When answering this last question, the courts must be "wary of legislatures who would rely on our intervention" by setting "'a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied." *Id.* (quoting *United States v.*

Reese, 92 U.S. 214, 221 (1875)). Here the Court need look no further than the final factor, for the Act, on its face, makes clear that Congress would prefer no Act at all to one that includes a health exception.

The Act's Congressional findings indisputably establish that passing a ban without a health exception was a principal concern of Congress.[3] Five out of fourteen of the Congressional findings assert that procedures banned by the Act are not medically necessary and/or that no health exception is required. *See* Partial Birth Abortion Ban Act, sec. 2(1), (2), (5), (13), (14(o)). (PA 589a-591a, 594a, 598a.) While acknowledging that this Court in *Stenberg* struck down the Nebraska ban for failing to provide a health exception, the Findings attempt to justify Congress's omission of an exception, in spite of that decision. *See* Partial Birth Abortion Ban Act, sec. 2(8) ("[T]he United States Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg* under the "clearly erroneous" standard. Rather, the United States Congress is entitled to reach its own factual findings"), sec. 2(13) ("There exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial birth abortion is not required to contain a 'health' exception . . ."). (PA 591a-592a, 594a.) Further bolstering the conclusion that Congress intended that the ban be enforced without a health exception, the Findings assert that courts should conclusively defer to the Congressional findings that no such exception is required. *See* Partial Birth Abortion Ban Act, sec. 2(8)-2(13) (PA 591a-594a); *see also, Planned Parenthood Fed'n of Am.*, 2006 WL 229900, at * 17 ("Enacting a 'partial-birth abortion' ban *with no health*

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[3] Indeed, the Petitioner does not disagree or even address the Ninth Circuit's recognition that this was one of Congress's chief concerns. *See Planned Parenthood Fed'n of Am.*, 2006 WL 229900, at *17-18.

exception was clearly one of Congress's primary motivations in passing the Act.").

The conclusion that imposition of a health exception would "circumvent the intent of the [Congress]" is also supported by the fact that Congress chose not to include a severability provision. Given the overall tenor of the Congressional findings, including the explicit recognition that the Act does not conform to *Stenberg*, the decision not to include a severability clause can only be seen as a preference to unsuccessfully stand on the principal that no health exception is required and have the Act invalidated rather than having the Act modified by the courts. *See Planned Parenthood Fed'n of Am.*, 2006 WL 229900, at * 18 ("When Congress deliberately makes a decision to omit a particular provision from a statute—a decision that it is aware may well result in the statute's wholesale invalidation . . . we would not be faithful to its legislative intent were we to devise a remedy that in effect inserts the provision into the statute contrary to its wishes.")[4]

The findings establish that Congress passed the Act without a health exception in order to challenge *Stenberg*'s holding that such an exception is needed in abortion restrictions such as the Act. Given this explicit objective, apparent from the face of the Act itself, Congressional intent is clear: Congress would prefer no statute at all to a statute whose application has been limited by a health exception.

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[4] Respondents have focused only on the evidence of Congressional intent apparent on the face of the Act. As the Ninth Circuit points out, there is additional evidence in the Congressional record to support the conclusion that Congress would prefer no Act to one providing a health exception. *See Planned Parenthood Fed'n of Am.*, 2006 WL 229900, at *17 (noting that Congress rejected amendments that would have added a health exception and that Congressional supporters of the ban "asserted that the purpose of the Act would be wholly undermined if it contained a health exception").

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For the foregoing reasons and those stated in the opposition to the petition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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